

01  
02  
03  
04  
05  
06 UNITED STATES DISTRICT COURT  
07 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

08 CATARINO CACATZUN-SOP, ) CASE NO. C08-1225-RSL  
09 )  
Petitioner, )  
10 )  
v. ) REPORT AND RECOMMENDATION  
11 )  
A. NEIL CLARK, )  
12 )  
Respondent. )  
\_\_\_\_\_ )

13  
14 I. INTRODUCTION AND SUMMARY CONCLUSION

15 Petitioner Catarino Cacatzun-Sop, proceeding through counsel, has filed a Petition for  
16 Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, challenging his detention by the U.S.  
17 Immigration and Customs Enforcement (“ICE”) at the Northwest Detention Center in Tacoma,  
18 Washington. (Dkt. 1). Petitioner requests that he be released pending adjudication of his Petition  
19 for Review in the Ninth Circuit Court of Appeals, arguing that his mandatory detention under  
20 Section 236(c) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1226(c), is indefinite  
21 under *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). (Dkt. 1).  
22 Respondent has moved to dismiss, arguing that petitioner is lawfully detained under the Attorney

01 General's discretion pursuant to INA § 241(a)(6), 8 U.S.C. § 1231(a)(6). (Dkt. 10).

02 Having carefully reviewed the entire record, I recommend that petitioner's habeas petition,  
03 Dkt. 1, be DENIED and that respondent's motion to dismiss, Dkt. 10, be GRANTED.

04 **II. BACKGROUND AND PROCEDURAL HISTORY**

05 Petitioner is a native and citizen of Guatemala who entered the United States without  
06 inspection on or about November 14, 1994. (Dkt. 11 at L271). On August 1, 1995, he applied  
07 to the former Immigration and Naturalization Service<sup>1</sup> ("INS") for asylum. *Id.* The INS denied  
08 the application and issued an Order to Show Cause, charging petitioner with being deportable  
09 under INA § 241(a)(1)(B), for having entered the United States without inspection. (Dkt. 11 at  
10 R37-38, L271).

11 On July 18, 1996, an Immigration Judge ("IJ") denied petitioner's applications for asylum  
12 and withholding of deportation, but granted him voluntary departure in lieu of deportation until  
13 October 18, 1996, with an alternate order of deportation to Guatemala. (Dkt. 11 at L259-71,  
14 L294). Petitioner's voluntary departure order ripened into a deportation order on October 19,  
15 1996, after he failed to voluntarily depart the United States. Petitioner attempted to file an appeal  
16 of the IJ's decision with the Board of Immigration Appeals ("BIA"), but the appeal was submitted  
17 late and the BIA dismissed the appeal as untimely on May 28, 1997. (Dkt. 11 at L257).  
18 Accordingly, petitioner's order of removal became administratively final on that date. *See* INA  
19 § 101(a)(B), 8 U.S.C. § 1101(47)(B). On June 25, 1997, petitioner filed a motion to reconsider,

---

20  
21 <sup>1</sup> On March 1, 2003, the INS was dissolved as an independent agency within the  
22 Department of Justice and its functions were transferred to the Department of Homeland Security  
("DHS"). Homeland Security Act of 2002, Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205  
(2002).

01 which the BIA denied on June 30, 1997. (Dkt. 11 at L314-15, R54).

02 On August 14, 2007, ICE arrested petitioner at his residence in Portland, Oregon, and  
03 transferred him to the Northwest Detention Center in Tacoma, Washington, where he remains  
04 detained. (Dkt. 11 at R88-89).

05 On October 29, 2007, petitioner filed a motion to reopen his deportation proceedings with  
06 the BIA, based on alleged ineffective assistance of counsel. (Dkt. 11 at L330-26). The BIA  
07 denied petitioner's motion on February 26, 2008. (Dkt. 11 at L341-42). Petitioner filed a Petition  
08 for Review of the BIA's decision denying his motion to reopen, and a Motion for Stay of Removal  
09 with the Ninth Circuit. *See Cacatzun-Sop v. Gonzales*, No. 08-71240 (9th Cir. filed March 25,  
10 2008). The Ninth Circuit subsequently granted petitioner's motion for stay of removal. *Id.*  
11 Petitioner's petition for review is currently pending in the Ninth Circuit.

12 On May 14, 2008, ICE conducted a "File Custody Review" of petitioner's case. (Dkt. 11  
13 at R178-85). On June 6, 2008, ICE Field Office Director A. Neil Clark issued a "Decision to  
14 Continue Detention" stating,

15 You have a demonstrated disregard for the immigration laws of the United States as  
16 evidenced by your refusal to comply with the voluntary departure order of an  
17 immigration judge on 7/18/1996. You remained in the United States illegally for nine  
18 years until your apprehension by Portland Fugitive Operations. Your disregard for  
19 the immigration laws of this country suggests that you would abscond in order to  
prevent your removal should the outcome of your petition with the Court not prove  
favorable. Therefore, it has been decided to continue your detention pending a ruling  
from the 9th Circuit Court of Appeals.

20 (Dkt. 11 at R187-88).

21 On August 5, 2008, petitioner filed the instant habeas petition, challenging the legality of  
22 his detention. (Dkt. 1). On September 9, 2008, the government filed a Return and Status Report

01 and Motion to Dismiss. (Dkt. 10). Petitioner did not file a response. The habeas petition and  
02 motion to dismiss are ripe for review.

### 03 III. DISCUSSION

#### 04 A. Petitioner is Lawfully Detained Pursuant to INA § 241(a)(6).

05 Section 236 of the INA provides the framework for the arrest, detention, and release of  
06 aliens in removal proceedings. That provision provides the Attorney General with discretionary  
07 authority to release an alien on bond or conditional parole pending the completion of removal  
08 proceedings, unless the alien falls within one of the categories of criminal aliens described in  
09 Section 236(c), for whom detention is mandatory. *See* INA § 236(c), 8 U.S.C. § 1226(c) (“The  
10 Attorney General shall take into custody any alien who” is deportable for having committed certain  
11 enumerated crimes); *see also Demore v. Kim*, 538 U.S. 510, 513 n.1, 123 S. Ct. 1708, 155 L. Ed.  
12 2d 724 (2003) (“Section 1226(c) authorizes detention of aliens who have committed certain  
13 crimes including, *inter alia*, any ‘aggravated felony’”).

14 Once removal proceedings have been completed, the detention and release of aliens shifts  
15 to INA § 241, 8 U.S.C. § 1231. Section 241(a)(1)(A) of the INA states that “when an alien is  
16 ordered removed, the Attorney General shall remove the alien from the United States within a  
17 period of 90 days (in this section referred to as the ‘removal period’).” INA § 241(a)(1)(A), 8  
18 U.S.C. § 1231(a)(1)(A). During the removal period, continued detention is required. INA §  
19 241(a)(2), 8 U.S.C. § 1231(a)(2). Section 241(a)(6) provides the Attorney General with  
20 discretionary authority to detain certain aliens beyond the removal period, or to release them under  
21 an order of supervision. INA § 241(a)(6), 8 U.S.C. § 1231(a)(6).

22 Petitioner claims that he is being unlawfully held in mandatory detention pursuant to INA

01 § 236(c). Respondent argues that INA § 236 is not the applicable statute because that section  
02 only applies to detention during removal proceedings. Respondent contends that petitioner is  
03 currently being detained under the post-order custody provision of INA § 241(a)(6) because he  
04 is subject to a final administrative order of removal, and petitioner's pending petition for review  
05 appeals the BIA's denial of his motion to reopen, not his order of removal. (Dkt. 10 at 7). The  
06 Court agrees with respondents.

07 The determination of when an alien becomes subject to detention under Section 241 rather  
08 than Section 236 is governed by Section 241(a)(1), which provides:

09 The removal period begins on the *latest* of the following:

10 (i) The date the order of removal becomes administratively final.

11 (ii) If the removal order is judicially reviewed and if a court orders a stay of the  
12 removal of the alien, the date of the court's final order.

13 (iii) If the alien is detained or confined (except under an immigration process), the  
14 date the alien is released from detention or confinement.

15 8 U.S.C. § 1231(a)(1)(B) (emphasis added).

16 In the present case, petitioner's removal period began on May 28, 1997, pursuant to INA  
17 § 241(a)(1)(B)(i) when the BIA dismissed petitioner's appeal as untimely. Although petitioner  
18 filed a petition for review in the Ninth Circuit, resulting in a stay of removal which remains  
19 pending, his appeal does not "entail judicial review of a *removal order*, as the plain text of the  
20 statute requires." *Diouf v. Mukasey*, 542 F.3d 1222, 2008 WL 4253851, \*5 (9th Cir. September  
21 18, 2008). Rather, petitioner's appeal challenges the BIA's denial of his motion to reopen.  
22 Accordingly, when petitioner was detained by ICE on August 14, 2007, he was not detained  
pursuant to INA § 236 because the removal period had already commenced.

01 The Ninth Circuit’s recently published decision in *Diouf* supports this conclusion. In  
02 *Diouf*, the Ninth Circuit reversed a decision by the district court which had granted habeas relief  
03 to a petitioner who had been detained for twenty-three months pending judicial review of the  
04 BIA’s denial of his motion to reopen removal proceedings. *Diouf*, 542 F.3d at 1222. The Ninth  
05 Circuit concluded that the district court had erred because its decision was based on the erroneous  
06 conclusion that Diouf’s detention was governed by INA § 236 rather than INA § 241. *Id.* The  
07 court held that “a stay entered while a court reviews an alien’s . . . *petition for review of the BIA’s*  
08 *denial of a motion to reopen* – does not prevent the removal period from beginning.” *Id.* See also  
09 *Prieto-Romero v. Clark*, 534 F.3d 1053, 1060 n.6 (9th Cir. July 25, 2008) (explaining that the  
10 “beginning of the removal period is not delayed by *every* judicially entered stay”).

11 Here, as in *Diouf*, petitioner is being detained under INA § 241(a)(6), not under INA §  
12 236, because his order of removal is administratively and judicially final. Petitioner’s removal  
13 period expired on or about November 13, 2007 – ninety days after he was detained by ICE on  
14 August 14, 2007 – and the statutory basis for his current detention is INA § 241(a)(6).

15 B. Petitioner’s Detention is Not Indefinite.

16 Petitioner also claims that his detention is indefinite because there is no significant  
17 likelihood of his removal in the reasonably foreseeable future, and that it is therefore not  
18 authorized under *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001).  
19 (Dkt. 1). In *Zadvydas*, the Supreme Court considered whether the post-removal-period statute,  
20 INA § 241(a)(6), authorizes the Attorney General “to detain a removable alien *indefinitely* beyond  
21 the removal period or only for a period *reasonably necessary* to secure the alien’s removal.”  
22 *Zadvydas*, 533 U.S. at 682. The petitioners in *Zadvydas* could not be removed because no

01 country would accept them. Thus, removal was “no longer practically attainable,” and the period  
02 of detention at issue was “indefinite” and “potentially permanent.” *Id.* at 690-91. The Supreme  
03 Court held that INA § 241(a)(6), which permits detention of removable aliens beyond the 90-day  
04 removal period, does not permit “indefinite detention.” *Id.* at 689-697. The Court explained that  
05 “once removal is no longer reasonably foreseeable, continued detention is no longer authorized  
06 by the statute. *Id.* at 699.

07 The Supreme Court further held that detention remains presumptively valid for a period  
08 of six months. *Id.* at 701. After this six-month period, an alien is eligible for conditional release  
09 upon demonstrating “good reason to believe that there is no significant likelihood of removal in  
10 the reasonably foreseeable future.” *Id.* The burden then shifts to the Government to respond with  
11 sufficient evidence to rebut that showing. *Id.*

12 The Court finds that petitioner has failed to satisfy his burden of showing that there is “no  
13 significant likelihood of removal in the reasonably foreseeable future.” *Id.* The Ninth Circuit has  
14 “construed this language to require the alien to show that he would be *unremovable* even if the  
15 government defeated his petition for review.” *Diouf*, 2008 WL 4253851 at \*8 (emphasis added).  
16 Here, there is not indication that petitioner is *unremovable*. Indeed, the government has  
17 successfully obtained a travel permit for petitioner’s removal to Guatemala. Although petitioner  
18 was not removed under that travel permit because of his stay of removal and the travel permit has  
19 since expired, the Guatemalan Consulate has stated that there would be no problem in issuing a  
20 new travel permit for petitioner. (Dkt. 10, Ex. 1). Once petitioner’s legal proceedings have been  
21 completed, ICE will remove petitioner to Guatemala or release him. Thus, “he is not stuck in a  
22 ‘removable-but-unremovable limbo,’ as the petitioners in *Zadvydas* were.” and his detention is not

01 indefinite. *See Prieto-Romero*, 534 F.3d at 1063.

02 Moreover, petitioner's detention has been implemented in a procedurally fair manner and  
03 does not violate procedural due process requirements. The administrative record shows that  
04 petitioner received a post order custody review, and that ICE considered the appropriate factors  
05 when reviewing petitioner's custody status.<sup>2</sup> (Dkt. 11 at R178-88). Accordingly, the Court  
06 concludes that petitioner is lawfully detained pursuant to INA § 241(a)(6) pending completion of  
07 his legal proceedings in the Ninth Circuit.

08 IV. CONCLUSION

09 For the foregoing reasons, I recommend that petitioner's habeas petition, Dkt. 1, be  
10 denied, and respondent's motion to dismiss, Dkt. 10, be granted. A proposed Order accompanies  
11 this Report and Recommendation.

12 DATED this 31st day of October, 2008.

13   
14 Mary Alice Theiler  
15 United States Magistrate Judge  
16

---

17 <sup>2</sup> Before making a decision regarding release, the Field Office Director must conclude that:  
18 (1) a travel document is not available or removal is not practical or in the public interest; (2) the  
19 detainee is nonviolent; (3) the detainee is likely to remain nonviolent; (4) the detainee is not likely  
20 to pose a threat to the community following release; (5) the detainee is not likely to violate the  
21 conditions of release; (6) the detainee does not pose a significant flight risk. 8 C.F.R. § 241.4(e).  
22 The Field Office Director should also consider the following factors: (1) disciplinary problems  
while incarcerated; (2) the nature and seriousness of the alien's criminal convictions including time  
served, probation history, and evidence of recidivism; (3) psychiatric and psychological reports;  
(4) evidence of rehabilitation; (5) favorable factors, such as ties to the U.S. including number of  
close relatives; (6) prior immigration violations and history; (7) the likelihood that the alien is a  
significant flight risk; (8) any other probative evidence. 8 C.F.R. § 241.4(f).